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No. 86-1287

# In the Supreme Court of the United States

OCTOBER TERM, 1986

RAYMOND C. AHLBERG, ET AL., PETITIONERS

*v.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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## TABLE OF AUTHORITIES

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Petitioners contend that they were wrongfully separated from the Community Services Administration when that agency was abolished by statute in 1981. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on any of the questions presented, and there is no conflict with any decision of this Court. The questions presented raise no significant legal issue, and are substantially similar to those on which certiorari was denied in *Menoken* v. *Department of Health and Human Services*, No. 86-93 (Oct. 14, 1986). Accordingly, review by this Court is not warranted.

1. a. Prior to September 30, 1981, the Community Services Administration (CSA) was responsible for administering federal anti-poverty program grants to community agencies. The Omnibus Budget Reconciliation Act of 1981

(OBRA), Pub. L. No. 97-35, 95 Stat. 357, however, eliminated the CSA and created the Office of Community Services (OCS), a new agency within the Department of Health and Human Services (HHS), to administer the block-grant program created by OBRA (Pet. App. 3a, 237a-240a). Unlike the CSA, which had more than 900 employees, the OCS had only 165 employees to carry out its functions (Pet. App. 4a).

After OBRA was signed into law, the CSA notified its employees that all positions at the agency would be abolished, that no reassignments were available, and that all employees would be separated by September 30, 1981. Shortly after that date, however, the United States District Court for the District of Columbia ruled that, under the Veterans Preference Act of 1944, 5 U.S.C. 3502-3503, HHS was required to reassign CSA employees to the OCS insofar as the CSA's functions were transferred to that agency. *National Council of CSA Locals* v. *Schweiker*, 526 F. Supp. 861 (D.D.C. 1981) (Pet. App. 420a-446a). HHS then offered the 165 positions that existed in the newly created OCS to those former CSA employees with the highest retention standing based upon preference order master lists. HHS created these lists because the CSA had not maintained adequate personnel records, a fact that prevented HHS from reconstructing exact reduction-in-force priority registers for CSA employees (Pet. App. 4a-5a, 241a-247a).

Former CSA employees not selected under this procedure appealed to the Merit Systems Protection Board (MSPB), claiming that they were unlawfully separated from the CSA and that they were entitled to be reinstated with back pay to positions with the OCS until the OCS properly carried out its own reduction-in-force. The MSPB agreed that HHS had not followed correct procedures for determining which former CSA employees should be transferred to the OCS, but it concluded that this failure did not

invalidate the entire reduction-in-force. Rather, the MSPB held that the appropriate remedy was to allow each former CSA employee to prove that he or she was entitled to a position with the OCS (Pet. App. 5a-7a, 247a-253a).

The former CSA employees appealed to the United States Court of Appeals for the Federal Circuit, which upheld the MSPB's decision. *Certain Former CSA Employees* v. *Department of Health and Human Services*, 762 F.2d 978 (1985) (Pet. App. 236a-277a). The court of appeals agreed that HHS's use of the master retention lists was not in literal compliance with normal reduction-in-force procedures, but it held that HHS nonetheless had afforded the former CSA employees all of the rights to which they were entitled under the Veterans Preference Act (Pet. App. 264a-265a, 269a-270a). The court concluded that any possible errors in the reassignment process could be corrected by the procedure that the MSPB had adopted: that is, to afford an opportunity on remand to each former CSA employee, including petitioners, to show that he or she was entitled to an OCS position that had been erroneously assigned to another former CSA employee (Pet. App. 265a-266a).

In the first case to reach the court of appeals following this remand, a former CSA employee challenged the MSPB's use of the master retention lists in deciding whether her individual claim to specific positions had merit. The Federal Circuit held that it had intended to give the MSPB broad discretion in determining the relative retention priorities of individual employees, and that the MSPB had not abused its discretion in using the master lists in deciding that employee's case. This Court denied certiorari. *Menoken* v. *Department of Health and Human Services*, 784 F.2d 365 (Fed. Cir.), cert. denied, No. 86-93 (Oct. 14, 1986) (Pet. App. 278a-298a).

b. In this case, as in *Menoken*, petitioners challenge the disposition of individual claims by the MSPB following the remand approved in *Certain Former CSA Employees*. Petitioners are two groups of employees separated from their positions when the CSA was abolished (Pet. App. 8a). The first group consists of individuals formerly employed in the CSA offices in Boston and Seattle. On remand, these petitioners either failed to make any submission at all to the MSPB (*id.* at 10a-11a) or failed to make a submission sufficient to show that they were entitled to specific OCS positions that had been assigned to other former CSA employees (*id.* at 12a-14a). The court of appeals held that, in the absence of such submissions, the MSPB had properly upheld denial of hearings on their claims of wrongful discharge (Pet. App. 14a-30a). Petitioners do not challenge this aspect of the court of appeals' decision in this Court.

The second group of petitioners consists of individuals formerly employeed in the Atlanta and Kansas City offices of the CSA. These individuals did make submissions on remand to the MSPB sufficient to entitle them to a hearing. Following hearings on their claims, however, the MSPB presiding officials determined that these former CSA employees had not established that there were positions at OCS for which they had higher retention rights than the other former CSA employees who had been transferred to the identified positions.

The MSPB upheld these determinations, and the court of appeals affirmed. Petitioners' sole contention was that the MSPB was required to construct standard reduction-in-force registers to determine their retention rights, and that the Board therefore had erred in using the master retention lists in determining individual entitlement to positions at OCS (Pet. App. 31a). Noting that it had "specifically rejected that contention in *Menoken*," the court of appeals reaffirmed its conclusion that HHS was not required to

recreate reduction-in-force registers and that the MSPB had not inappropriately relied on the master lists in rejecting petitioners' claims (Pet. App. 30a-34a).

2. a. Petitioners reiterate (Pet. 6-11) the same contention that was advanced in *Certain Former CSA Employees* and in *Menoken*—namely, that the separation of all CSA employees when that agency was abolished was null and void because HHS was required to transfer all CSA employees to the new OCS and then to conduct a reduction-in-force in a manner consistent with applicable regulations. The court of appeals properly rejected this argument in light of the unusual factual circumstances in this case: the abolition of an entire agency, coupled with an alteration in its function resulting in the need for only 165 rather than 900 employees in the successor agency. The court's decision does not, as petitioners contend (Pet. 7-9), conflict with *Vitarelli* v *Seaton*, 359 U.S. 535 (1959). As the Federal Circuit explained in *Certain Former CSA Employees*, "[t]he present case is far removed from *Vitarelli*" (762 F.2d at 984; Pet. App. 263a). There, a single employee was discharged on the ground that he was a security risk, in violation of the agency's procedures, and this Court held that he should be reinstated. 359 U.S. at 539-546. Here, the sheer number of employees involved and the inadequacy of CSA's records made the conduct of an ordinary reduction-in-force difficult if not impossible, so that there was a significant impediment to following the agency's prescribed separation procedures that did not exist in *Vitarelli*. For that reason, the remedy adopted here by the MSPB—that is, to allow each former CSA employee to show that he or she was entitled to a position with the OCS, rather than to invalidate the entire reduction-in-force—was "a reasonable method of dealing with perhaps a unique and certainly a most unusual situtation," a remedy that "fairly and appropriately adjusted and accommodated" the respective interests of the former CSA employees and the government

(*Certain Former CSA Employees*, 762 F.2d at 985; Pet. App. 271a). Petitioners' argument in essence is that they and more than 700 individuals whose jobs no longer exist should receive a back pay award from the Treasury for a five-year period during which they did no work and during which it was impossible for them to do any work. The court of appeals properly rejected that argument in *Certain Former CSA Employees* and in *Menoken*, and it properly rejected that argument for the third time here.

b. Petitioners' contention (Pet. 11-13) that the MSPB improperly relied on the master retention lists in deciding their individual claims is both fact-bound and erroneous. To support this argument they assert (Pet. 12) that the Federal Circuit in *Certain Former CSA Employees* stated that it was possible to recreate standard reduction-in-force registers despite the inadequacies of CSA's personnel records. In fact, however, the court in that case simply held that it was possible to determine the *relative retention rights* of persons not appointed to new positions at OCS (762 F.2d at 985; Pet. App. 267a-268a). As the court of appeals made clear in *Menoken*, it did not intend to require that the determination of relative retention rights be accomplished by reconstruction of "traditional reduction-in-force registers" on remand (784 F.2d at 370; Pet. App. 297a). Rather, the court intended to give the MSPB considerable discretion in determining the standards for resolution of individual claims. Petitioners here do not point to a single instance in which use of the master lists resulted in the failure to award a position to an individual who would have been entitled to that job if standard reduction-in-force registers had been used. The court of appeals properly rejected petitioners' broad-scale attack on procedures that represented a practical and equitable way of dealing with a highly atypical situation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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